

N O. 2 0 7 6 4
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALHAMBRA MOTOR PARTS, et al. ,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONERS' REPLY BRIEF
ON
PETITION TO
REVIEW ORDER OF
FEDERAL TRADE COMMISSION

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SUMMARY

Petitioners submit that the Respondent's Brief is based upon strained interpretations of the law, not warranted by the evidence.

We reiterate our contentions that:

- (1) SCJ, not its members, is the purchaser;
- (2) Section 4 prevents distribution of earnings from being a price discrimination;
- (3) The Commission has failed to sustain the burden of proof that the warehouse discount is not cost



justified; and

- (4) The attempt to eradicate cooperatives is beyond the powers granted to the Commission.

I

THE PURCHASER ISSUE

The Commission insists there is substantial evidence to support a finding that the jobber members, rather than SCJ itself, are the purchasers of the merchandise.

This evidence consists of the simple fact, always admitted, that SCJ is a cooperative. From this one fact, it is argued that the cooperative is the agent of its members who therefore become "purchasers". It appears to us that this argument is an unwarranted extension of the meaning of legal terms.

SCJ buys merchandise in large quantities, and pays for it from corporation funds. At this time, no single member is obligated to buy any part of the merchandise and certainly is not bound to pay for any of it.

At the hearing, Complaint Counsel tried to infer that the jobber gave the order and then SCJ went out to buy enough merchandise to fill that order. But an examination of the detailed invoices showing SCJ purchases and sales did not produce a single instance of such a transaction. The only evidence is to the contrary (Huffaker, 1939, Dixon, 20778, Kardas, 2021).

We, therefore, find it difficult to accept a ruling, that when

SCJ buys a carload of tail pipes, and a week or a month later, sells six items to a jobber that SCJ is the agent of the jobber. Is SCJ the jobber's agent for the purchase of the whole carload or only the six items? Certainly, the jobber can only be asked to pay for six. And which of the sixty odd members are principals for that merchandise not sold?

It seems the agency rule is one of convenience, with which the Commission can eradicate cooperatives.

It is argued (Brief, pp. 32-33) that this decision is necessary to close a loop hole. The reasoning is that a cooperative constitutes vertical integration and therefore is guilty of a violation of the Robinson Patman Act.

If the argument is sound, there can be no common ownership at the several functional levels. We know this is a false statement as there are well known instances of manufacturers operating warehouses and also jobbing outlets.

Gulf and Western, and Colyears, are two examples.

Why prosecute cooperatives merely because they are cooperatives?

II

SECTION 4 OF THE ROBINSON PATMAN ACT SAYS THAT DISTRIBUTION OF A COOPERA- TIVE'S EARNING IS NOT A VIOLATION.

The argument is that Section 4 allows only distribution of earnings which are the fruit of lawful activity (Brief 34).

Now, an attempt is made to distinguish between the method of distribution and the manner of earning those profits (Brief 36).

This is a little fine spun and really comes down to the same old contention, because it is a cooperative, it is illegal.

SCJ pays warehouse prices. So do other warehouses. It cannot be denied that, these prices being equal, there is no discrimination.

The jobber members buy at jobber prices, again equal and non-discriminatory.

Only when the earnings are distributed can there be any argument of discrimination. Suppose the earnings were not distributed - then there would be no price difference and, of course, no discrimination.

An attempt is made (Brief, 37) to argue that the elimination of a phrase from the Senate version, meant that the section was restricted to allowing pro rata distribution. We disagree; the final version of the Act reads "members, producers or consumers" which is no different from the eliminated phrase.

The authorities cited by the Commission seem to support our contention (Brief, 37, footnote 29). Here it is said:

" . . . it has been held that Congress inserted Section 4 to protect cooperatives from the charge that in granting patronage dividends only to members, they are discriminating in price against non-member patrons within the meaning of Section 2 (a). "

(Emphasis added.)

This fits the case at bar perfectly. The distribution of cooperative earnings to the jobber members is the one thing relied on to show discrimination as against non-members.

We believe the quote in the Brief, pp. 40-41, also supports our position. 1/

In Mr. Patman's remarks referred to in the Brief, p. 41 (Appendix B, 6, a), we think the term "voluntaries" must refer to cooperatives.

In this case, it is the distribution of earnings and nothing else which is the sine qua non of the Commission's argument. Without it, there is no semblance of a discriminatory price differential.

To say that earning the discount is illegal is to go back to this idea that the cooperative is illegal. Certainly, no business can continue if it is not allowed any earnings, ever.

III

COST JUSTIFICATION

The Commission's brief seems to treat this point as if SCJ had the burden of proof. But the evidence must be considered

1/ See also: Kentucky Rural Electric Co. v. Mahoney Electric Co.,
282 F.2d 481, cert. den. 365 U.S. 812.

Here the Court said distribution of earnings does not in and of itself constitute a violation even though a return of profit might technically be considered a violation.

under the requirement that Complaint Counsel had this burden. The order confirms this (4034).

The brief (at p. 42), states the Commission found "there was no substantial difference in the methods in which these suppliers sold or delivered products and to direct buying jobbers".

This is more imagination than fact. SCJ buys in carload or truckload lots, but there is no evidence concerning the amounts purchased by direct jobbers. It is common knowledge that larger orders entail relatively less expense than a series of small orders (Webster, 1274; Livoni, 1834).

Obviously, since SCJ purchases more merchandise than other warehouses, it must purchase larger quantities than any individual jobber, and deliveries by the suppliers are made only to the SCJ warehouse.

SCJ serves its members by breaking bulk, without forcing any jobber to buy a case when he doesn't need all of it. See RX 35 and 36 for a demonstration of what it means to break bulk.

We believe the evidence is clear that an individual jobber does not buy in the same manner or in the same quantities as SCJ and any conclusion that there is no difference is unwarranted.

Counsel for the Commission labor over an argument that there is no comparison with so-called independent warehouses. But Mr. Helm, Complaint Counsel, stenuously contended he was going to show that SCJ differed from other warehouses (1008). And this appeared to be the major objective of most of the evidence. A number of straw men were set up.

Catalogs seemed most important, although SCJ never contended it printed catalogs. Nor did it claim it did more or less than any other warehouse in distributing catalogs.

A further argument is made that SCJ utilizes local warehouses which reduces it to the status of a fee warehouse.

However, it is undenied that the manufacturer, not the warehouse, determines whether a particular WD is served by the local warehouse or not (Livoni, 1775; Dixon, 2051).

The big argument is salesmen (Brief, 54-55). Because SCJ does not have a big sales force, it just can't be a warehouse. But we have already pointed out (Opening Brief, 33) that SCJ seems to sell more merchandise than its competitors and it seems to get new customers for the manufacturer (Fleer, 1225; 1298; Costello, 1401, 1423; Webster, 1279).

SCJ members and employees act as salesmen to the other members (Huffaker, 1958-9).

It is interesting to note at this point that two Commissioners, Elman and Jones, and the Trial Examiner, Lewis, were completely satisfied that SCJ performed all the functions of a warehouse distributor. (4080, 4083, 4098, 3814).

It is now argued (Brief 19, 43) that there is no protection for a functional discount, hence it is of no importance to compare SCJ with other warehouses. We think there is good reason for comparison -- does anyone believe manufacturers would sell to warehouses if the latter did not furnish a quid pro quo by selling merchandise and relieving the manufacturer of the duties of

warehousing, breaking bulk, small deliveries, credit, etc. ? Of course, warehouses must not spend all their discount because without profit, they cannot exist.

Furthermore, if as Counsel would have you believe, SCJ is not entitled to as much discount as other warehouses, there arises a situation where a manufacturer is selling two customers at the warehouse level and performing the same functions, at different prices. This is discrimination and, if as is now claimed, the warehouse discount cannot be cost justified, then the prices must be equalized. If SCJ is then allowed an increase, the situation would be as it is today. If the other warehouses must reduce to the SCJ level, they will lose money according to the evidence in this case.

Again, we invite attention to the evidence as a whole. Complaint Counsel compared SCJ with other warehouses. There is no evidence about independent jobbers other than the fact they pay jobber prices.

Much is said about sales representatives calling on SCJ jobbers. But every one of them said they call on all jobbers about the same, whether they are customers of SCJ, or other warehouses, or direct buyers. So, as far as this one fact is concerned, it has no effect on the case. No effort was made by complaint counsel to evaluate the comparative sales expense as contrasted with service.

We submit that Complaint Counsel have failed to present substantial evidence of lack of cost justification and, in place of

evidence, the majority opinion rests only on wishful thinking.

IV

THE COMMISSION, BY THIS PROCEEDING, IS ATTEMPTING TO PUT COOPERATIVES OUT OF EXISTENCE.

In its Brief (pp. 58-62), it is said that this conclusion is not true, that the Commission only seeks to prevent a cooperative from inducing illegal discounts.

Let us examine how they go about it! First, it is contended that sales are made from the suppliers to the jobbers. Only then can there be any semblance of different prices.

Second, although the evidence is clear that SCJ performs every facet of the business of a warehouse distributor, and that these functions save large sums of money for the supplier, in the case of SCJ, the warehouse discount is not cost justified. Apparently, this is based largely on the lack of a highly paid sales force, regardless of the uncontradicted evidence that SCJ outsells its competitors and does secure new customers for its suppliers.

Lastly, when profits from trading operations are returned to the jobber members, it is called a discriminatory price rebate. Section 4 is swept under the rug!

If a cooperative cannot make and utilize a profit, it cannot exist.

In Central Retail Owned Grocers, Inc. v. FTC, 346 F.2d 410 (7th Cir. 1963), it was held that it could not be inferred that

cooperative earnings were the same as a brokerage.

We contend here, that it cannot be inferred that cooperative profits are the same as an illegal price discount.

Or to put it another way, the profits themselves cannot be the essential illegality.

As to the proffered settlement, we think the Commission is not justified in contending SCJ refused to negotiate.

We asked some questions which have not been answered. The conditions imposed by the settlement (See Appendix C, pp. 9a-10a) are stated as follows:

- (a) Eliminate membership fees (repaying the present members with interest);
- (b) Invite all jobbers to join;
- (c) New and old members to share dividends;
- (d) No drop shipments;
- (e) Maintain an adequate warehouse.

Can a cooperative exist while complying with these conditions?

We think not!

If any great number of new members accept the invitation, the capacity of the existing warehouse will not be sufficient to serve them. The Commission has not answered our question if it would be discrimination to refuse new members who cannot be adequately served. Nor can the cooperative build a new warehouse if deprived of working capital and any means of procuring it.

It would appear that the Commission did not desire to

discuss these questions.

CONCLUSION

We contend that SCJ, not its members, is the buyer, that there is no substantial evidence that the warehouse discount is not cost justified, that Section 4 prevents the conclusion that distribution of profits is illegal and that the Commission is not justified in exterminating cooperatives.

On this basis, we ask that the complaint be dismissed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Harris K. Lyle

HARRIS K. LYLE

